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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Broadcast Music, Inc. ("BMI") and the named representatives of the defendant class of writers and publishers of music who have entered into agreements with BMI to license performance rights to their works[1] respectfully petition for a writ of certiorari to review so much of the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on August 8, 1977, as reversed the decision of the district court granting judgment to defendants.

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1. Paul Anka, Jerry Bock, Fred Ebb, Norman Gimbel, Sheldon Harnick, John Kander, Charles Koppelman, Don Rubin, Joseph Stein, Al Gallico Music Corp., Associated Music Publishers, Inc., Duchess Music Corp., Edward B. Marks Music Corp., Hill and Range Songs, Inc., Hollis Music, Inc., Maclen Music, Inc., Peer International Corp., Screen Gems-Columbia Music, Inc., Sunbeam Music, Inc. and Unart Music Corp.

OPINIONS BELOW

The majority and separate opinions of the court of appeals are reported at 562 F.2d 130. Upon the denial of petitions for rehearing Judge Moore issued an opinion which is unreported. The opinion of the district court dismissing the complaint after a full trial on the liability issues is reported at 400 F. Supp. 737. These opinions are reprinted in a separate Appendix to this Petition.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1977. A timely petition for rehearing and suggestion for rehearing in banc was denied on December 6, 1977. On February 17, 1978, Mr. Justice Marshall extended the time to file this petition until May 5, 1978. This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

BMI, a corporation which is not owned or operated by writers or publishers, is a middleman in the business of licensing copyrighted musical compositions for public performance. BMI has entered into agreements with thousands of writers and publishers of music giving BMI rights to grant public performance licenses to their compositions. Thousands of users of music have negotiated with BMI for "blanket" licenses under which they obtain the right to use all the compositions in the BMI repertory in return for a flat fee or a percentage of designated receipts. A user is

free to obtain licenses to perform music in the BMI repertory directly from writers and publishers and need not obtain licenses from BMI.

The Second Circuit held that the offering of blanket licenses constituted price fixing and copyright misuse. The questions presented by the Second Circuit's decision as to these petitioners are:

1. Whether writers and publishers of music and the independent middleman through which they have licensed their copyrighted musical compositions for public performance can be found to have engaged in price fixing in violation of the Sherman Act in the absence of any agreement between the middleman and the writers and publishers as to the price that any licensee would be charged?

2. Whether it is per se illegal to offer blanket licenses to perform large numbers of musical compositions, when consent decrees negotiated by the Department of Justice require that such licenses be offered, and when such licenses have been found to avoid the practical problems of composers in monitoring the fleeting and scattered uses of their works and the difficulties of users in locating and negotiating with the numerous and widely dispersed creators of the works they wish to use?

3. Whether it is copyright misuse for some fifty thousand writers and publishers to enter into agreements with an independent middleman who in turn grants blanket licenses for the public performance of their compositions, where the copyright owners are also prepared to grant individual licenses directly to any user electing not to take a blanket license, and where blanket licenses are found to constitute a reasonable solution to the unique distribution and supply problems in the business of performance rights licensing?

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides, in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . ."

STATEMENT OF THE CASE

The Parties

Petitioner BMI, a defendant below, is a corporation founded in 1939.[2] BMI has negotiated agreements with many thousands of writers and publishers of music to license their music and currently has such agreements with more than 33,000 writers and more than 16,000 publishing companies (hereinafter sometimes referred to as BMI "affiliates"). Certain of these writers and publishers were named in the complaint as representatives of the defendant class of BMI affiliates and are also petitioners herein.

2. BMI's stock is owned by approximately 485 local broadcasters. (A.2a, 27a; references to "A. " are to pages of the separate Appendix to this Petition.)

American Society of Composers, Authors and Publishers ("ASCAP"), a defendant below, is a membership organization of writers and publishers of music which was founded in 1914. (A.25a-27a.) Certain ASCAP members were named in the complaint as representatives of the defendant class of ASCAP members. ASCAP and these ASCAP members are filing a separate petition for review of the judgment below.

Respondent Columbia Broadcasting System, Inc. ("CBS"), the plaintiff below, operates one of the three national television networks. CBS supplies programs to some 200 affiliated television stations and to its five wholly-owned television stations. A giant in the entertainment industry, CBS also owns and operates fourteen radio stations, one of the four national radio networks, the world's largest record company, and several music publishing companies which either are members of ASCAP or have agreements with BMI. (A.27a-28a, 58a-59a, 90a, 93a.)

BMI Agreements with Writers and Publishers

Each of the agreements BMI has negotiated with writers and publishers gives BMI a right to issue licenses to perform the copyrighted works of the writer or publisher. In return, BMI has agreed to make license payments to each affiliate as calculated under formulae established from time to time by BMI.[3]

Under the terms of the consent decree entered in *United States* v. *Broadcast Music, Inc.*, 64 Civ. 3787 (S.D.N.Y. December 29, 1966) (the "BMI Decree"), BMI must also permit writers and publishers to issue performance licenses

3. All of BMI's income, after expenses and provision for reserves, is paid out to its writer and publisher affiliates. (A.27a.)

directly to users.[4] The court of appeals affirmed the district court's finding that BMI's affiliates can, and would if CBS asked, negotiate and issue performance licenses directly to CBS. (A.8a-10a, 111a-120a.)

BMI Blanket Licenses

A blanket license from BMI gives the licensee the right to perform any of the more than one million compositions in the BMI repertory, without advance notice and any number of times during the term of the license, in return for a flat dollar amount or a fee expressed as a percentage of designated receipts. (A.3a, 6a, 25a-26a.)

The fee charged by BMI for a blanket license is exclusively a matter for negotiation between BMI and music users. Writers and publishers who agree to permit BMI to license their works do not participate in BMI's determination as to what price BMI will seek from users or in any other licensing decision. BMI is not a membership organization of writers and publishers; BMI is owned by its stockholders, and writers and publishers play no role in its management. (A.2a, 27a.)

Blanket Licensing and the Music Business

The market for performance rights to copyrighted music is a vast and complex one. In this country alone, there are more than 80,000 writers and publishers of music holding copyrights on millions of compositions. Obtaining per-

4. ASCAP, as required by its consent decree, obtains only a nonexclusive right from its members to license their compositions. (A.6a.) Although the form of the BMI Decree differs from the form of ASCAP's decree, as the district court stated, "the parties have stipulated that CBS could secure direct licenses from BMI affiliates with the same ease or difficulty . . . as from ASCAP members." (A.33a.)

formance rights to these compositions and the works of foreign composers as well[5] is an important part of the successful operation of a huge entertainment industry made up of many thousands of separate operations ranging in size from local bars to nationwide television networks.

Performing rights organizations have developed throughout the world in response to the unique problems presented by the performing rights market. Public performances of music are so fleeting, and music users so numerous and widely scattered, that no individual copyright holder could hope to detect and collect for all unauthorized uses of his work. On the other hand, most music users desiring both to perform a variety of music and to avoid copyright infringement would face severe practical difficulties in obtaining direct licenses to the works they wished to perform. Freedom of choice in the selection of music might be achieved, if at all, only at great expense if it were necessary to identify and contact the copyright owners each time a particular work was selected for performance.

Blanket licensing of performance rights by organizations such as ASCAP and BMI arose in response to these market needs, and it continues to serve these salutary purposes today.[6] (A.25a-26a.) As the district court stated:

5. BMI and ASCAP have reciprocal licensing arrangements with organizations from nearly 40 countries, including every major country in the world except China. The world-wide adverse effect of the Second Circuit's opinion is discussed in an amicus curiae brief to be filed herein by The Performing Right Society Limited and Société des Auteurs, Compositeurs et Editeurs de Musique, the British and French performing rights organizations.

6. Congress has given express statutory recognition to the role of the performing rights organizations in the Copyright Act of 1976, which became effective on January 1, 1978. In 17 U.S.C. § 116, the section of the Act providing for compulsory licenses for jukeboxes, the Copyright Royalty Tribunal is directed to distribute all jukebox

(footnote continued on next page)

> "Convenience is the prime virtue of the blanket license: it provides comprehensive protection against infringement, that is, access to a large pool of music without the need for the thousands of individual licenses which otherwise would be necessary . . . . Moreover, it gives the user unlimited flexibility in planning programs, because any music it chooses is 'automatically' covered by the blanket license." (A.26a.)

By acquiring rights to license performance rights from numerous copyright owners and offering these rights for sale, in bulk, to music users, BMI acts as an ordinary middleman. BMI provides both to the writers and publishers and to those who desire to use their music an alternative method of distribution and supply which enables them to avoid the prohibitive transaction costs—measured both in money and in quality of product—that direct negotiation would so often entail.

For virtually its entire existence, BMI's operations have been regulated by consent decrees negotiated with the Department of Justice. ASCAP's operations have been subject to consent decree since 1941. The decrees now in effect have for many years required both BMI and ASCAP to offer blanket licenses. (A.4a-7a, 29a-33a.)

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royalty fees to which copyright owners unaffiliated with a performing rights organization do not prove entitlement, to the performing rights organizations; BMI, ASCAP and SESAC, Inc. are mentioned by name.

In 17 U.S.C. § 111, Congress established government-sponsored blanket licensing for certain secondary transmissions of cable television systems, with fees based on each system's gross receipts. The House Report on the bill indicates that blanket licensing was chosen because

> "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976).

Prior Proceedings

CBS has held blanket licenses since commercial television began. Indeed, CBS led the group of broadcasters which founded BMI in 1939 and caused it to issue its first blanket licenses. (A.2a, 27a-28a, 51a.)

On December 31, 1969, following a breakdown in negotiations for the renewal of its BMI blanket license, CBS filed the complaint in this action, seeking declaratory and injunctive relief.[7] (A.52a-54a.) CBS alleged that it had been compelled to accept blanket licenses (although it was BMI, not CBS, which had terminated the existing blanket license and although CBS had never prior to BMI's notice of termination objected to a blanket license (A.52a-54a, 79a)), and argued that the offering of such licenses by BMI and ASCAP constituted tying, boycotting, price fixing, monopolization and misuse in violation of the antitrust and copyright laws. (A.33a-34a.)

CBS sought to require BMI to offer a new type of license in which BMI would be required to fix a price level for each type of use of a composition in its repertory. Alternatively, CBS requested an order enjoining BMI from offering blanket licenses to any of the television networks. (A.3a, 25a, 38a.)

In 1973, following extensive discovery, a twenty-nine day trial on issues of liability was held before Judge Morris E. Lasker of the Southern District of New York. Every aspect of music licensing was examined in depth at the trial.

Upon careful evaluation of the mass of evidence before him, Judge Lasker held that the offering of blanket licenses by ASCAP and BMI did not unreasonably restrain trade and did not otherwise violate the antitrust or copyright laws.

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7. CBS invoked the jurisdiction of the district court under 15 U.S.C. § 26 and 28 U.S.C. §§ 1331(a), 1337 and 1338(a).

(A.114a-121a.) The district court found that most music used on CBS' television network was composed especially for the program on which it is performed and that, as to other music, composers and publishers were eager to have it performed on nationwide television. (A.56a-61a, 69a-71a, 84a-85a, 90a-91a, 112a.) The court concluded that copyright proprietors "would deal readily on a price basis . . . ." (A.120a.) Accordingly, since the offering of blanket licenses was found not to obstruct CBS' acquisition of licenses directly from the copyright owners, the district court entered judgment in favor of the defendants.

On August 8, 1977, the Second Circuit reversed the district court in part. While the court of appeals upheld the dismissal of most of CBS' antitrust claims and did not disturb *any* of the district court's findings of fact, Judges Gurfein and Anderson joined in ruling that, "with respect to the television networks," the offering of blanket licenses constituted per se unlawful price fixing. (A.21a.) In addition, in the last sentence of its final footnote, the court added, without elaboration, that the offering of blanket licenses also constituted copyright misuse.[8] (A.23a.)

REASONS FOR GRANTING THE WRIT

This petition should be granted because of the significant impact of the decision below on antitrust theory, on the creators of music throughout the world, and on government enforcement of the antitrust laws:

First, with what has been described as a "hasty" application of the per se rule,[9] the court held that the practices of each of the major licensing organizations—ASCAP and BMI—constituted price fixing, even though the court's reasoning had no application whatever to BMI. The holding that BMI is a price fixer would make the ordinary business operations of every independent wholesaler or middleman per se unlawful.

Second, the court applied rules of per se illegality without disturbing any of the extensive findings by the district court that the offering of blanket licenses created no unreasonable restraint. Indeed, the Second Circuit itself conceded that the blanket license offered was *not* a "'naked restraint.'" (A.22a.)

Third, having precipitately applied a per se rule to a case that required rule of reason analysis, the court tried to accommodate the obvious indicia of reasonableness that permeated the trial record by doing further violence to per se doctrine: although the offering of blanket licenses was held per se unlawful, the Second Circuit ruled that blanket licensing need not be prohibited, but might continue if ASCAP and BMI were required to offer another form of license as well. (A.21a-22a.) But if the Second Circuit were correct that blanket licensing was price fixing and copyright misuse, the new per use license ordered by the court would be an even clearer case of price fixing and misuse.

Fourth, relying on its erroneous price fixing rationale and giving no attention to copyright policy questions or equitable considerations, the Second Circuit unjustifiably held that the copyrights on all compositions available through BMI or ASCAP have been misused—thus casting a

8. In a rather puzzling concurring opinion, Judge Moore appeared to disagree that blanket licensing constituted price fixing but agreed that there should be a remand. (A.23a.)

9. Case Comment, 91 Harv. L. Rev. 488 (1977).

cloud on the enforceability in the United States of virtually every musical copyright in the world. It is reported that since the Second Circuit's decision CBS has already ceased to pay ASCAP for the use of music on CBS' television network. That alone represents a loss of income to writers and publishers of more than $4 million per year. If other users follow suit, the impact will be devastating.

Fifth, the decision of the Second Circuit that the offering of blanket licenses by BMI and ASCAP constitutes price fixing is in conflict with the decision of the Ninth Circuit in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968). In *K-91*, the Ninth Circuit held that ASCAP's offering of blanket licenses was not price fixing and did not otherwise violate Section 1 of the Sherman Act. For the reasons stated in ASCAP's petition for certiorari herein, the decisions cannot be reconciled.

Finally, the Second Circuit's decision substantially reduces the utility of consent decrees when it holds that conduct affirmatively required by the Department of Justice in long-standing consent decrees is unlawful per se.[10] Surely there should be a presumption that the Department of Justice has not required practices which have a

> "pernicious effect on competition and lack . . . any redeeming virtue . . . ." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958).

10. The BMI and ASCAP consent decrees permit the offering of blanket licenses in general and affirmatively require the offering of a form of blanket license (the per program license) under which payments are made only with respect to programs using licensed music. (A.6a-7a, 29a-32a.) At oral argument in the court of appeals, Judge Gurfein, speaking of the 1950 ASCAP decree, noted,

> "It is ordered in the decree to do certain things—that is, to give a blanket license." (Tr. 7)

While a private litigant is free to challenge practices authorized by a consent decree, *see Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961), practices required by a decree clearly ought to be evaluated under the rule of reason.[11]

The Department of Justice having required the conduct that was here held per se unlawful, the interests of the United States are very much involved in the disposition of this case. Apparently recognizing this, the court of appeals suggested that the district court invite the Department of Justice to participate or express its views on remand. (A.22a.) Ten years ago this Court, in considering the petition for certiorari in *K-91, Inc.* v. *Gershwin Publishing Corp., supra,* invited the Solicitor General to submit the views of the United States. 389 U.S. 805 (1967). The Solicitor General filed a brief supporting the conclusion of the Ninth Circuit that ASCAP's offering of blanket licenses was not price fixing, and this Court allowed the decision to stand. Once again the question whether blanket licensing constitutes price fixing is presented. We respectfully suggest that this Court again invite the Solicitor General to express the views of the United States.

11. *Cf. Silver* v. *New York Stock Exch.*, 373 U.S. 341 (1963), declining to apply per se rules where practices were undertaken in context of legislative regulation.

I.

THE SECOND CIRCUIT'S PRICE FIXING RATIONALE HAS NO APPLICATION TO BMI AND THE THOUSANDS OF WRITERS AND PUBLISHERS WHOSE WORKS ARE LICENSED BY BMI.

The nearly fifty thousand writers and publishers who license their works to BMI have been branded price fixers and held guilty of misusing the copyrights on which the livelihoods of many of them depend—on a theory that has no application whatever to their conduct.

The Second Circuit's price fixing rationale is entirely dependent on the nature of ASCAP as a membership organization of writers and publishers.[12] The court looked at the ASCAP organization and saw horizontal agreements on division of the proceeds of the blanket license. It concluded that such agreements would improperly affect prices at which direct licensing transactions would occur, because

> "the determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to that member of the combination for his composition." (A.11a; footnote omitted.)

Necessarily, any decision made by ASCAP on dividing fees is a decision by otherwise competing writers and publishers.

Writers and publishers who license through BMI, however, are in an entirely different position. They have not agreed among themselves. Each has independently entered into an agreement with BMI under which BMI has agreed to make payments to him for his work; these payments bear no direct relationship to the amount BMI receives from

12. Although BMI's structure and ownership are entirely different from ASCAP's, the court stated in a footnote that references to ASCAP should be taken to include BMI. (A.2a.)

CBS or any other licensee. Writers and publishers have no ownership interest in BMI and no control over its policies. Writers and publishers dealing with BMI have done no more than enter into agreements with a wholesaler or middleman interested in licensing their works. And BMI has negotiated independently with users on the price for what it licenses.

BMI is no more a price fixer than is a wholesaler of eggs who buys eggs separately from a number of farmers and sells them together to a supermarket chain. If the supermarket chain did not like the wholesaler's price, it could hire a man and a truck to go around to the farmers and make direct purchases. Doubtless the chain could obtain lower prices from the farmers than it paid to the wholesaler, but the direct purchases would make economic sense only if the price differential were sufficient to pay for the man and the truck.

As the district court found, CBS is free today to seek licenses directly from copyright owners, and copyright owners would eagerly grant such licenses. (A.69a-72a, 84a-85a, 90a-91a.) BMI exercises no control over the market; it has succeeded in issuing licenses only because users regard the blanket license as a less expensive alternative than collecting direct licenses with their attendant transaction costs. (A.119a-120a.)

To be sure, the price of a BMI license—like any other price in a market—has an effect on what would be charged in direct licensing transactions. The effect, however, is procompetitive rather than anticompetitive. The blanket license is an alternative means of securing the desired products—rights to perform copyrighted music. Thus, the price of a blanket license acts as a check on direct license prices, since users can select a blanket license if direct license prices are too high.

In overwhelmingly selecting blanket licenses (A.26a), users have given clear indication that blanket licenses are less expensive and more efficient than any other kind of license. We are aware of no other case which in the name of antitrust has outlawed a competitive alternative, let alone the least expensive and most efficient alternative.

II.

THE SECOND CIRCUIT'S DECISION SERIOUSLY DISTORTS THE ROLE OF PER SE RULES.

This Court has reserved per se rules for only those practices "whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality . . . ." *National Society of Professional Engineers* v. *United States,* 46 U.S.L.W. 4356, 4359 (U.S. April 25, 1978) (No. 76-1767). Thus, "*per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." *Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 49-50 (1977). When the conduct is comprised of "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed," per se analysis is inappropriate. *National Society of Professional Engineers* v. *United States, supra.* The per se concept is designed to provide predictability and to permit obviously anticompetitive practices to be enjoined without the need for a full-scale trial. *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5 (1958). The court of appeals' decision is contrary to the teaching of this Court and achieves none of the goals of per se analysis.

The threshold question in determining whether or not to classify a practice as per se illegal is whether or not the court has sufficient information about

> "the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue'. . . ."

White Motor Co. v. *United States,* 372 U.S. 253, 263 (1963), quoting *Northern Pacific Railway Co.* v. *United States, supra,* 356 U.S. at 5.

There was no reason in the present case for the Second Circuit to believe that it had the required knowledge as to the impact of the offering of blanket licenses, since it recognized that the music licensing industry is "*sui generis*" and that "the practical complexities of licensing musical nondramatic performing rights can find no precise analogy anywhere."[13] (A.3a-4a.) The court, however, accepted without analysis CBS' claim that blanket licensing had the effect of "fixing" the prices that would be asked in direct licensing transactions, and ruled that blanket licensing is thus per se unlawful. (A.11a-12a, 13a.) While the court

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13. As this Court has recognized, per se rules are general and inflexible rules which may not lead to appropriate results if applied to unusual fact situations. *See, e.g. Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 50 n.16 (1977). In a number of cases presenting unusual fact situations, practices apparently vulnerable if judged by per se rules have been tested—and sustained—on a rule of reason basis. *See, e.g., United States* v. *Citizens & S. Nat'l Bank,* 422 U.S. 86 (1975); *Silver* v. *New York Stock Exch.,* 373 U.S. 341 (1963); *Evans* v. *S.S. Kresge Co.,* 544 F.2d 1184 (3d Cir. 1976), *cert. denied,* 433 U.S. 908 (1977); *United States* v. *Jerrold Elecs. Corp.,* 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961). *Cf. Mackey* v. *National Football League,* 543 F.2d 606 (8th Cir. 1976), *cert. dismissed pursuant to Rule 60,* 98 S. Ct. 28 (1977) (per se rule held inapplicable; practice held unlawful under rule of reason).

had to recognize that there had been no agreement on direct license prices, it incorrectly read the language in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940), that agreements which "tamper" with price structures are per se unlawful, as meaning that the per se rule was the exclusive standard for evaluating price-affecting agreements.

Yet most agreements alleged to affect prices have ordinarily been evaluated under the rule of reason.[14] For example, when presented with joint delegation of pricing decisions to an agency controlled by a group of competitors, or with an express agreement among competitors as to the prices at which they would buy or sell during a given part of the business day, this Court has looked to the purpose, effect and industry context of such agreements, decided that they were *not* "price fixing" agreements, and upheld them under the rule of reason. *See Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933); *Standard Oil Co. (Indiana)* v. *United States*, 283 U.S. 163 (1931); *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918).[15]

14. *See, e.g., United States* v. *Container Corp. of America*, 393 U.S. 333 (1969); *Sugar Inst., Inc.* v. *United States*, 297 U.S. 553 (1936); *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588 (1925); *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563 (1925). *See also United States* v. *Citizens & S. Nat'l Bank*, 422 U.S. 86 (1975).

Several recent lower court decisions have also refused to recognize a "constructive" price fixing offense such as the Second Circuit created below. *DuPont Glore Forgan Inc.* v. *American Tel. & Tel. Co.*, 437 F. Supp. 1104, 1126-29 (S.D.N.Y. 1977), *aff'd*, No. 77-6154 (2d Cir. March 17, 1978); *United States* v. *Nu-Phonics, Inc.*, 433 F. Supp. 1006, 1013 (E.D. Mich. 1977); *Cullum Elec. & Mechanical, Inc.* v. *Mechanical Contractors Ass'n*, 436 F. Supp. 418, 427-28 (D.S.C. 1976), *aff'd*, 569 F.2d 821 (4th Cir. 1978); *Arizona* v. *Cook Paint & Varnish Co.*, 391 F. Supp. 962, 965-67 (D.Ariz. 1975), *aff'd*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977); *Jacobi* v. *Bache & Co.*, 377 F. Supp. 86, 95-96 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

In *Standard Oil Co. (Indiana)* v. *United States*, *supra*, the Court was confronted with agreements among licensors of interlocking patents on a price for a license to all of the patents and on a formula for division of the proceeds. The Court noted (283 U.S. at 168) that each patent owner

> "was to share in some fixed proportion the fees received under these multiple licenses. The royalties to be charged were definitely fixed in the first contract, and minimum sums per barrel, to be divided between the Texas and Indiana companies, were specified in the second and third."

Despite the obvious impact of these agreements on price, the threshold question whether such agreements should be judged by per se rules was answered in the negative. The Court stated that, "Such contracts must be scrutinized to ascertain whether the restraints imposed are regulations reasonable under the circumstances . . . ." *Id.* at 169. The Court then proceeded to find that the agreements did not violate the antitrust laws because each competitor retained the right to issue individual licenses. *Id.* at 170-71.

In view of these precedents, any case involving conduct alleged merely to *affect* prices requires a preliminary deter-

15. Several lower court cases have also held that not all price agreements or competitor sales through joint agents constitute price fixing. *Eastern Scientific Co.* v. *Wild Heerbrugg Instruments, Inc.*, [Current] 5 Trade Reg. Rep. (CCH) (1978-1 Trade Cases) ¶ 61,926 (1st Cir. March 17, 1978); *Evans* v. *S.S. Kresge Co.*, 544 F.2d 1184, 1190-93 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *International Mfg. Co.* v. *Landon, Inc.*, 336 F.2d 723, 729 (9th Cir. 1964), *cert. denied*, 379 U.S. 988 (1965); *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153, 166-68 (S.D.N.Y. 1960); *United States* v. *Morgan*, 118 F. Supp. 621, 688-91 (S.D.N.Y. 1953).

mination as to whether per se treatment is appropriate. Where the effect on price is not clear or where there are proper procompetitive purposes for the alleged restraint, a rule of reason analysis should be applied. Here, both of these factors were present and ignored by the court of appeals. Adopting an "overly simplistic"[16] approach, the court failed to make this threshold determination.

Committed by its erroneous reading of *Socony-Vacuum, supra,* to a course of applying a per se rule, the court ignored every signal indicating that per se analysis was inappropriate. Neither of the functions of a per se rule could be served here. The virtue of predictability was hardly protected by holding per se unlawful practices which were required by government consent decree and had been openly engaged in by thousands of writers and publishers for decades. The result could hardly have been more startling. Nor was predictability advanced by the enunciation of an "exception" to the per se rule in which the legality of the practice turns on the "market necessity" of the practice to the buyer (A.13a-16a), or by the ruling that a practice held per se illegal might in some circumstances be allowed to continue. (A.21a-23a.) Conservation of trial time was hardly a factor since the district court had already conducted an exhaustive rule of reason trial. *See Mackey* v. *National Football League,* 543 F.2d 606, 619-20 (8th Cir. 1976), *cert. dismissed pursuant to Rule 60,* 98 S. Ct. 28 (1977). To ignore the extensive record in favor of making a priori suppositions was pointless and dangerous.

Diverted from the extensive record by its per se approach, the Second Circuit made an erroneous assumption which was central to its conclusion that blanket licensing

16. Case Comment, 91 Harv. L. Rev. 488, 491 (1977).

necessarily has an anticompetitive effect on prices. The court assumed that

> "the very availability of the blanket license . . . must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete." (A.20a; emphasis in original.)

The record shows, however, and the district court found, that this proposition is utterly false because the individual writer or publisher has no power to choose the method by which the network will license the music it wants. The facts are that

> —selection of music is made by the user (A.56a-61a, 63a-64a, 67a-69a, 72a, 90a-93a, 103a, 108a, 112a),
>
> —there is a high degree of interchangeability among songs suitable for network television use (A.48a, 92a, 119a-120a), and
>
> —if a copyright owner will not license in the manner a television network user wants, his music will not be used. (A.89a-93a, 105a-106a, 108a, 112a, 119a-120a.)

So long as a user elects to employ blanket licenses, the copyright owner has no occasion to compete for direct sales to that user since the user does not want to buy two licenses for the same music. When a user chooses not to take a blanket license, however, the copyright owner has every incentive to compete for direct sales to that user.[17] (A.62a, 120a.)

17. Even Judge Moore, who voted to deny rehearing, recognized that the majority's "assumption" "that the blanket license 'reduces price competition among the members and provides a disinclination to compete'," is "unsupported by proof." (A.125a.)

The offering of blanket licenses creates a competitive alternative in the market place to which the user, not the copyright owner, can turn. Its effect on the prices that can be charged in direct licensing transactions is procompetitive. There was no rational basis on which the court of appeals could hold the offering of blanket licenses per se illegal.

III.

THE SECOND CIRCUIT HAS CREATED A WHOLLY INEQUITABLE DOCTRINE OF COPYRIGHT MISUSE.

Under the equitable doctrine of patent misuse, a patentee whose conduct extends the patent monopoly beyond the scope permitted by Congress or the Constitution cannot enforce his patent. *Morton Salt Co.* v. *G.S. Suppiger Co.*, 314 U.S. 488 (1942). The doctrine has been applied to deny enforcement in numerous cases where patentees have engaged in various anticompetitive practices and have not "purged" the misuse by abandoning the improper practice. This Court has never decided whether a comparable antitrust-related misuse doctrine should be applied to copyrights.

The Second Circuit's offhand footnote statement that the millions of copyrights in the ASCAP and BMI repertories had been "misused" [18] raises that question in the most compelling possible context. The livelihoods of composers and publishers depend upon the continued unimpaired enforceability of these copyrights. Yet the Second Circuit's opinion gives no indication that the court actually considered the consequences of its misuse finding or took into account

18. "We dispose of CBS' claim of copyright misuse in the same manner and for essentially the same reasons as the § 1 claim." (A.23a.)

the different policy considerations relating to patents and copyrights.[19]

Despite their similarity for some purposes, there is a vast difference between patents and copyrights in their potential for misuse. The grant of an important patent can have tremendous economic impact. A new industry can arise under the sole control of a statutory monopolist. Old methods of producing familiar products can be rendered uneconomical and obsolete by a single invention, and a patentee may be able to dictate the terms upon which previous enterprises will be allowed to continue to operate.

Even the most popular copyrighted song lacks anything like the economic clout of an important patent. Inability to perform a particular song would not exclude anyone from engaging in the music business at any level. Numerous important and popular works are in the public domain and constantly available. Other copyrighted compositions could readily be substituted. Indeed, users with talent would find

19. The lower courts have previously been presented with antitrust-related copyright misuse defenses in several cases. Most have rejected the defense. *See, e.g., Harms, Inc.* v. *Sansom House Enterprises*, 162 F. Supp. 129 (E.D. Pa. 1958), *aff'd per curiam sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F.2d 494 (3d Cir. 1959); *Buck* v. *Cecere*, 45 F. Supp. 441 (W.D.N.Y. 1942). Others have upheld or been willing to entertain it. *See, e.g., M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed per curiam sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949). At least one court sought to apply a balancing test—a remedy less stringent than the *Morton Salt* test. *Alfred Bell & Co.* v. *Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). None of these courts attempted an in-depth analysis of policy requirements and the policy distinctions between copyright and patent problems. *See generally* Gibbs, "Copyright Misuse: Thirty Years Waiting for the Other Shoe," 23 ASCAP Copyright L. Symp. 31 (1977); Fine, "Misuse and Antitrust Defenses to Copyright Infringement Actions," 17 Hastings L.J. 315 (1965); Note, "The Misuse Defense in Copyright Actions," 37 N.Y.U. L. Rev. 916 (1962); Nicoson, "Misuse of the Misuse Doctrine in Infringement Suits," 9 U.C.L.A. L. Rev. 76 (1962).

it simple enough to "invent around" a song and replace it with an original work. Quite unlike the patent field, artists could not be excluded from practicing any "method" or "process" from which, for example, all "rock" songs or all "folk" songs derive.

Thus, even if "abused," the copyright monopoly would have little potential for creating wide-ranging adverse economic effects, and there was no reason to suppose that this Court would approve the application of identical misuse doctrines in patent and copyright cases.

Nor would it be equitable to apply such a misuse doctrine in the present case in light of what these composers and publishers have actually done.[20] While remaining able and willing to grant direct licenses themselves, they have simply licensed BMI and ASCAP to license others to perform their compositions. They have used the historically accepted manner of selling music performance rights through licensing organizations. They have dealt with organizations whose offering of blanket licenses has long been recognized and even required by government consent decree.

Even if these acts could be held to have violated the antitrust laws, this would be one case where the remedies available under those laws should be exclusive. Any misuse doctrine surely should retain enough of the equitable nature of its origin not to allow a court to apply it on these facts.

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20. Indeed, a holding of misuse in the present case would be most inequitable because copyright owners have so little guidance as to how the "misuse" could be purged. At oral argument CBS' counsel stated,

> "Now, it is also true that in this per use system that price negotiated between ASCAP and CBS would be a price which would influence the price of direct licensing transactions between program producers and publishers." (Tr. at 25.)

Since the per use license required by the Second Circuit must itself be price fixing if the Second Circuit's analysis of blanket licensing be accepted, there would be grave risks in attempting a unilateral determination of what conduct would actually constitute purging.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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